No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 47600

No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

This is a writ of error to the District Court for the Northern District of California. The case was criminal and arose under the National Prohibition Act.

The information against the plaintiff in error filed June 13, 1923, was in three counts. The first charged that the defendant Henry Heitman and another on June 4, 1923, at 950 Hampshire Street, San Francisco, and within the jurisdiction of this court, maintained a common nuisance in that they did then and there wilfully and unlawfully keep for sale on the

premises aforesaid certain intoxicating liquors, to-wit:

> 2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy.

In the second count it was charged that at the same time and place the defendants did unlawfully possess certain intoxicating liquor, to-wit:

> 2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy, describing the same articles.

In the third count it was charged at the same time and place that defendants did wilfully and unlawfully have in their possession certain property designed for the manufacture of certain intoxicating liquor, thereupon describing certain property.

The defendant, Henry Heitman, was alone placed upon trial and convicted upon all counts (Tr. p. 13). Thereupon he was sentenced to be imprisoned for one year in the county jail of San Francisco and that he pay a fine of $300 or in default of payment that he be further imprisoned until the fine is paid or he be otherwise discharged by due process of law (Tr. p. 72).

The brief on behalf of plaintiff in error does not contain a statement of the evidence; we forbear to

add such a statement, believing that the points discussed do not require it. The following reference to the testimony while incomplete will indicate sufficient portions of the proof.

Witness BERNHARD, a Federal Prohibition Officer, on June 24, 1923, accompanied Agent Powers to 950 Hampshire Street. It was a dilapidated building. Witness guarded the back window and Powers went through the door. Witness entered, went up a ladder through a trap door into the upper floor and found there two 20 gallon stills complete and they were going, fires were under them. They were running full blast. Three thousand gallons of mash, 1000 gallons of Jackass Brandy, 3 hydrometers, 2 pressure tanks, 5 500 gallon vats, 8 15 gallon kegs, 3 50 gallon barrels, 4 barrels, 3 water tanks, and a lot of coaloil were found. In the rear of the barn there were two cars, a Ford Touring Car and a Ford Truck. When witness got in there was nobody up where the stills were going full blast but at the window which was open there was a cord rope hanging down which was the only way whoever was up there operating had to get down. Witness went out, leaving Agent Powers, returning in a moment. Witness saw Powers and defendant Heitman walking towards him. Powers said "This is Heitman, you know him don't you?" Then Heitman said, "Now, listen, here, can't we fix this thing up." "I don't want any trouble" (Tr. pp. 17-18).

Witness identified a bottle and contents, stating the

contents were out of the worm of the still that it was dripping ino the bucket.

Witness POWERS, a Federal Prohibition Agent, testified that he visited the premises at 950 Hampshire Street, that for a period of about six or seven weeks he had been following Heitman on account of remarks around town. That he found that Heitman twice entered the premises on Hampshire Street. One could smell the still in operation and the mash fermenting a block away. On the date in question witness entered the premises with Bernhard. Witness saw the stills in operation and seized them. A few minutes later defendant Heitman walked in and said "How do you do". Witness recognized him. He walked out, went directly to where the two Ford Machines were, the Manager (that is a man accosted when the officers first went there) walked up to him. Witness was about 10 or 12 feet behind. As he walked toward the machine the manager said "Here is one of them". Witness said: "Who operates the still?" and he said "Yes". I said "All right, Mr. Heitman, you are under arrest, come back". We walked back to where the stills were. I said, "You know me, don't you, Federal Agent Powers?" He said yes, Powers. I said you are under arrest. He said "Can't we fix it up". I said wait a minute, let us tell Bernhard about it. We walked over to Bernhard and he said again "Can't we fix it up fellows, I am in a jam", or some remark along that line. Witness said in this place was the property testified to by Agent Bernhard.

When Heitman walked into the paint shop and saw witness he stopped. He was going in the general direction of the stills when he saw witness.

Heitman testified on his own behalf and said he was arrested at 590 Hampshire Street, and not at 950 Hampshire Street, and that he did not own the property nor was he engaged is operating a still or manufacturing liquor at 590 Hampshire Street or at the place Powers said he was neither.

There was introduced in evidence the record of the conviction of defendant Heitman by his plea of guilty to one count of an information which count charged that on the 27th of November, 1922, at Salada Beach, County of San Mateo, he had in his possession certain property designed for the manufacture of liquor, being 2 40-gallon stills, 11 50-gallon barrels of mash, several sacks of grain and sugar then and there intended for use in violating the prohibition act.

The charge of the court is brought up in the bill of exceptions. There is also contained (Tr. p. 62) an instruction proposed by defendant which was refused by the court to the effect

> "if you find from the evidence that liquor was not kept for sale at 950 Hampshire Street in the City and County of San Francisco, State of California, then you must acquit defendant of the charge contained in the information of maintaining a common nuisance in violation of section 21 of Title 2 of the National Prohibition Act."

The court further instructed the jury that evidence had been admitted that the defendant plead guilty to the possession of a still upon another information at Salada Beach and that the jury were to take that evidence into consideration only in their determination of the first count of charge of the complaint, being the nuisance count (Tr. p. 59).

The principal stress of the argument of plaintiff in error in this court seems, as it appears to us, to be directed to the conviction upon the first count of the information.

ARGUMENT.

I.

Concerning variance in respect of nuisance count:

The greater portion of the argument for plaintiff in error concerns points limited to the first count of the information which charged a nuisance. Upon the authority of the case of

Hattner vs. U. S., 293 Fed. 381,

it is said that there was a variance between the crime charged and the crime proven in that while it was charged that the nuisance was maintained at 950 Hampshire Street, San Francisco, the premises were in fact at 590 Hampshire Street. It is said that the point arises in several different ways. As to the greater number of the exceptions so taken it is clear that the point is not well taken.

For example, complaint is made of the court's refusal to direct a verdict claimed upon the theory of the variance referred to. (Tr. p. 31). But there was evidence, even upon the point in question, sufficient to sustain a verdict for the government. For Agent Bernhard had testified (Tr. p. 16) that he accompanied Agent Powers to 950 Hampshire Street, and Agent Powers testified (Tr. p. 23), "I had occasion to visit the premises at 950 Hampshire Street", and thereupon the two agents described the incidents as occurring there. Thus the court properly denied the motion. It is true that there was testimony tending to show that the defendant was arrested at number 590 Hampshire Street. Accordingly, the matter came into controversy and an issue arose.

It is further contended that the court erred in striking out the testimony given by counsel for the defendant (Tr. pp. 32, 33). It seems to us, however, that as far as this exception goes, the ruling was proper for it would have been improper to permit counsel for the defendant to testify to his conclusion that a certain street number was the building "described by the witness".

Another exception arose upon the court's instruction in regard to the number of the street at which the still was found (Tr. p. 59). The court said, "that the question whether it was 950 or 590 was of no concern if you find that a still was actually found there". It is submitted that the statement related to counts two and three of the information charging that the

defendant possessed intoxicating liquor and possessed property designed for the manufacture of intoxicating liquor. It is submitted that as far as these counts are concerned, and the instruction apparently related to them, any such variance was immaterial and the jury were properly so told. Thus a charge that a sale was in one part of the city of San Francisco, while the proof was that in fact it was at another point, the variance would be immaterial and properly disregarded.

McDonough vs. U. S., 299 Fed. 30, 40.

Finally it is contended that the court erred in refusing an instruction proposed by the defendant as follows:

> "If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the 'National Prohibition Act' ".

We do not disguise our opinion that, if the law was correctly stated in the case of

Hattner vs. U. S., supra,

this instruction should have been given. It is true that the situation in the Hattner case was that the different points referred to were some four miles apart. Here the variation in the street number could not have exceeded a few blocks. The proposition in-

volved is really the application of the Sixth Amendment to the effect that the defendant is entitled to be informed of the charge against him. Yet, it is held universally that the actual locus charged is not vital; the charge may otherwise be properly identified, hence a mere mistake in the locus would not be material. Here the defendant was charged with a nuisance which consisted in his maintaining a premises where liquor was sold. There is no dispute as to the premises which it is charged he maintained, that is to say, a certain barnlike, frame structure on Hampshire Street where there were two large smoking stills. An officer seeking to seize the property would have no trouble in determining that the proper building was the one where the stills were located. He would not be mislead by any mere variation in a number.

We think the ruling in the Hattner case must be referred to the particular transaction there involved, and that the alleged variance in the instant case would not be vital.

II.

As to evidence of other similar offenses.

The further contention is made by counsel that prejudicial error was committed by the court in allowing the government to prove that the defendant had been arrested for and committed other similar offenses.

It is claimed that the testimony referred to related to a different time and a different place. We think it is clear that the main contention of the government was sound. The defendant, as we have seen, was prosecuted in one count for the maintenance of a nuisance, that is to say, that he maintained a premises where intoxicating liquor was kept for sale in violation of Title II of the National Prohibition Act. In another count it is claimed that he had certain property designed for the manufacture of liquor intended for use in violation of the National Prohibition Act. Thus there was involved under the first count the element of the defendants intent in the premises, that is to say, the government was called upon to prove that liquors kept by the defendant upon the premises were kept by him for sale, and that the stills described were designed for the manufacture of liquor intended for unlawful use. There was thus involved an affirmative intent apart from a mere intent to violate a law shown by a commission of a forbidden act. Upon all authorities, in such case the government has the right to prove other similar offenses not too remote in time or place as an aid in convincing the jury that the defendant had the necessary criminal intent in the instant case. For, in the case of

Schultz vs. U. S., 200 Fed. 234, 237,

it was said:

> "If intent, motive, knowledge, or design be one of the elements of the crime charged, and

> especially if it is claimed that the crime was committed in accordance with a system, plan, or scheme, evidence of other like conduct by the defendant at or near the time charged is admissible.

In so ruling the Circuit Court of Appeals of the Eighth Circuit cited the following cases:

> *Brown vs. United States,* 142 Fed. 1
>
> *Dillard vs. United States,* 141 Fed. 303
>
> *Walsh vs. United States,* 174 Fed. 615
>
> *Ex parte Glaser,* 176 Fed. 702,
>
> *Thompson vs. United States,* 144 Fed. 14.

And in the same case the same Circuit Court decided the further proposition as to what is meant by a nearness of time or place when it said:

> "The question at once arises: What is meant by at or near the time of the transaction charged? This is a matter almost wholly confided to the discretion of the trial court. In *Packer vs. United States,* 106 Fed. 906, 46 C. C. A. 35, it was held that transactions a year prior to the one in question might be received in the discretion of the trial court."

It was further decided in the same case that evidence of such conduct on behalf of the defendant, even after the commission of the alleged crime might be admissible.

The same rule is frequently applied in National Bank prosecutions.

Thus in

Apgar vs. U. S., 255 Fed. 16, 19,

the Circuit Court of Appeals of the Fifth Circuit so ruled. In the Apgar case it is held that it was proper to show that the defendant had theretofore obtained money from his bank on a note that he knew to be forged, in that such testimony had some tendency to prove that when on *other occasions* he obtained the bank's money in the way charged; he did it with intent to injure and defraud it.

And in this Circuit the principle has been applied to a nuisance count in the case of

Hazelton vs. U. S., 293 Fed. 384.

Thus it is clear from the authorities cited that upon such a prosecution the government is entitled to prove another similar offense that such offense would not be too remote, if less than a year prior, and that whether the offense proposed to be proven be not too remote, is a matter to be determined by the discretion of the court.

In the instant case the crime prosecuted for was charged to have been committed June 4, 1923, at Hampshire Street, which is in the southeast portion of San Francisco. The government was permitted to prove a judgment upon a plea of guilty upon the first count of an information which charged that the

defendant on the 27th day of November, 1922, at Salada Beach, in the adjoining county, had in his possession certain stills designed for the manufacture of liquor intended for use in violating Title II of the National Prohibition Act. It was clearly not remote in time or place; it was clearly a similar offense and it was absolutely proven in that the defendant plead guilty and was sentenced. It may be pointed out that mere evidence that the defendant on the same occasion was arrested, would not add to or distract from the relevancy of the proof. The jury may have inferred that he could not have been prosecuted, unless he was arrested. Proof of arrest in the same connection would be mere preliminary matter of inducement and wholly without prejudice. Something is said about proof of another incident at an old barn in Valimar Canyon, an unidentified place, but it was further shown that the defendant was never arrested for that. The matter appearing at page 28 of the Transcript is apparently unconsequential, and would not necessarily require the court to instruct with reference thereto.

Moreover, if the court should determine that the verdict upon the first count is not sustainable upon the point of the variance in the street numbers, the exceptions discussed under this action could be wholly disregarded for the evidence here discussed was applied by the court wholly to the determination of the first count when it instructed the jury (Tr. p. 29) that the Salada Beach matter was only to be

taken into consideration upon determination of the nuisance count of the information.

III.

The Assistant United States Attorney was not guilty of misconduct in his argument.

It is contended that prejudicial error was committed by Assistant United States Attorney McDonald, both in his opening argument and his closing argument.

The first exception appears at pages 55 and 56 of the Transcript. It will be noted that the Assistant United States Attorney began by declaring that the defendant was one of the most flagrant and persistent offenders against the Prohibition Act in this district. If he was concerned in the maintenance of the still described, as the government had the right to ask the jury to infer, he *was* a flagrant offender against the Prohibition Act. Manifestly he was a persistent offender because he had been previously convicted and the government could properly have referred to such conviction upon at least one element in the case. Thereupon exception was taken to the remarks, and they were assigned as misconduct. The court was asked to instruct, and so far from refusing, it declared that it would do that very thing. The declaration of the court in itself would have cured any alleged error. There was a further discussion by counsel for the government and certain statements were made which seem to us to be inferences that the

government was entitled to draw from the testimony. At the end an exception was noted and the court asked the jury to disregard the statement. The court responded: "I will instruct them to the best of my ability what the purpose of that testimony is," and, as we have seen, an appropriate instruction was given as to evidence of other similar offenses. If the matter were of any importance, it would have thus been cured.

Further strictures are made upon a statement in the closing argument for the government as follows: "I am going to ask you to take into consideration his connection with that former case, his prior record in connection with the still". That is no more than asking the jury to consider the conviction in the former case, being evidence of a similar offense upon the issue of the defendant's intent in the nuisance count, and as we have seen, the court confined that line of testimony to that issue. Manifestly the matter was not even erroneous; in any event it could not have been deemed prejudicial.

Accordingly, it is submitted that the conviction of the defendant upon counts two and three of the information is unimpeachable. In fact the argument of the defendant here adduced would have a bearing only upon the first count. We do not deem that defendant's contention as to the first count had any merit whatever apart from the point of the variance of the place of the alleged nuisance. It is not disputed that this point may be grave, but the matter

is submitted to the court with the suggestion that even if the sentence must be reversed as to the first count, it should clearly be sustained as to counts two and three.

Respectfully submitted,

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Defendant in Error.